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10/564,452	01/12/2006	Christina Ammann	3717519.00038	8957
29157	7590	02/18/2010		
K&L Gates LLP P.O. Box 1135 CHICAGO, IL 60690			EXAMINER GWARTNEY, ELIZABETH A	
			ART UNIT 1794	PAPER NUMBER
			NOTIFICATION DATE 02/18/2010	DELIVERY MODE ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

chicago.patents@klgates.com

### **ATTACHMENT TO ADVISORY ACTION**

The Amendment to the claims filed January 28, 2010 will be entered. Claims 1-2 and 8-15 are pending.

The examiner notes, as amended, the invention as claimed would still be found unpatentable over Spivey-Krobath et al. (WO 02/39834) in view of Brassart et al. (US 6,489,310).

Applicants' arguments filed January 28, 2009 have been fully considered but they are not persuasive.

Applicants submit a Declaration under 37 C.F.R. 1.132 to demonstrate the nonobviousness of the claimed invention with respect to the prior art. Applicants find that data from a controlled study shows "surprising and unexpected tolerability of a composition having an increased amount of fiber that is nearly identical to the presently claimed composition as compared to a similar composition having a lower amount of fiber" (Exhibit B). In addition, Applicants find that a "composition including 4.5 to 6g protein/100ml composition and acacia gum as a soluble fiber in addition to pea out fiber and fructooligosaccharides demonstrated good shelf-stability for 8 months and was judged to have a good taste" (See specification, Examples at pages 12-15). Lastly, Applicants describe the synergistic effect that is surprisingly observed between fructooligosaccharides and acacia gum on the bifidogenic effect, i.e. reduces potential abdominal discomfort typically associated with the intake of fructooligosaccharides.

The question as to whether unexpected advantage has been demonstrated is a factual question. *In re Johnson*, 747 F.2d 1456, 1460, 223 USPQ 1260, 1263 (Fed. Cir. 1984). Thus, it is incumbent upon applicant to supply the factual basis to rebut the prima facie case of

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obviousness established by examiner. See, e.g., *In re Klosak*, 455 F.2d 1077, 1080, 173 USPQ 14, 16 (CCPA 1972).

First, applicants have not shown that comparison samples in said *Declaration* fairly represent the closest prior art. While applicants demonstrate that a nutritional composition comprising high fiber (Clinutren<sup>®</sup> 1.5 Fibre) was as well tolerated as a similar, non-fiber composition (Clinutren<sup>®</sup> 1.5), applicants have not shown a comparison with the closest prior art, i.e. Spivey-Krobath et al. Further, while applicants describe a synergy between fructooligosaccharides and acacia gum on the bifidogenic effect, given Spivey-Krobath et al. disclose a composition comprising a combination of acacia gum and fructooligosaccharides, applicants have not established that the composition of Spivey-Krobath would not display the same bifidogenic effect. With regards to stability and taste, while applicants find that the presently claimed composition has good taste and good shelf-stability, applicants have not demonstrated that these findings are unexpected or different in comparison to the nutritional composition of Spivey-Krobath et al.

In this case, applicants have not provided any evidence to show that the nutritional composition of modified Spivey-Krobath et al. would not exhibit the same benefits as the presently claimed invention.

Regarding inherency, applicants argue that because Spivey-Krobath et al. and Brassart et al. both fail to disclose the presently claimed compositions having certain protein amount, it is improper to allege that the compositions of Spivey-Krobath et al. and Brassart et al have viscosity ranges that are identical to the viscosities of the presently claimed compositions. Applicants argue that Examiner has fails to show that the compositions of Spivey-Krobath et al.

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and Brassart et al "necessarily" provide for compositions having a viscosity of about 30-80 mPas.

Given that Spivey-Krobath et al. and Brassart et al both disclose protein in amounts that overlap or would be expected to have the same properties as the amounts presently claimed, it is clear that the references as combined disclose compositions identical to that presently claimed. Thus, given that Spivey-Krobath et al. and Brassart et al disclose compositions identical to that presently claimed, it is clear that the compositions would inherently possess a viscosity of about 30-80 mPas.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Elizabeth Gwartney whose telephone number is (571) 270-3874. The examiner can normally be reached on Monday - Friday; 7:30AM - 3:30PM EST..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/E. G./

Examiner, Art Unit 1794

/Keith D. Hendricks/

Supervisory Patent Examiner, Art Unit 1794